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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 312

HARRY R. SWANSON, AS SECRETARY OF THE STATE OF NEBRASKA, ET AL.,

Appellants,

vs.

GENE BUCK, INDIVIDUALLY AND AS PRESIDENT OF THE AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS, ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEBRASKA.

APPELLANTS' BRIEF IN OPPOSITION TO THE MOTION TO DISMISS OR AFFIRM.

WALTER R. JOHNSON,
Attorney General of Nebraska;
JOHN RIDDELL,
Assistant to the Attorney General of Nebraska;
WILLIAM J. HOTZ,
Special Assistant to the Attorney General of Nebraska,
Counsel for Appellants.

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SUPREME COURT OF THE UNITED STATES

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APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEBRASKA.

APPELLANTS' BRIEF AND ANSWER TO THE APPELLEES' MOTION TO DISMISS OR AFFIRM THE APPEAL.

Filed July 16, 1940.

To the Honorable Supreme Court of the United States:

I.

Statement of the Case.

(*Buck* v. *Swanson*, 33 Fed. Supp. 377.)

1. An original petition was filed and the case thus started on June 7, 1937, in the United States District Court at

Lincoln, Nebraska, under Section 266 of the Judicial Code by the plaintiffs (now appellees) who sought to restrain and enjoin the defendants (now appellants), who are the law enforcement officials of the State of Nebraska, from enforcing the provisions of a certain anti-monopoly statute (Session Laws Nebr. 1937, Chap. 138, Page 488), passed by the Nebraska Legislature on May 17, 1937. The State Act so passed was directed against any combinations in substantial numbers of owners or those in control of the public performance rights of vocal and instrumental musical compositions, if the combination operated in restraint of trade in Nebraska and in violation of the terms of the said State statute. There was and is now no State court ruling upon the Act in question. A permanent injunction, after hearing on the merits on September 18th to 21st, 1939, became final for the purpose of this appeal on March 28, 1940, because on that day motion for rehearing or to correct and amend the findings of fact, conclusion of law, and decree of January 25, 1940, was overruled by the three-judge court which sat especially to hear the motions. A temporary injunction had been granted to the appellees on November 1, 1937, from which no appeal was taken. Therefore, appellants on June 27, 1940, perfected an appeal by serving and by having signed and filed the hereinafter mentioned appeal papers, seeking a reversal of the cause and a dismissal of the permanent injunction, as permitted by Sections 266 and 238 (3) of the Judicial Code.

2. The appellees filed on July 3, 1940, under Rule 12 (3), the motion to dismiss or affirm, which is now before the United States Supreme Court for decision thereon. Appellants answer that motion and pray that it be denied because of the following facts and hereinafter cited supporting rules and United States Supreme Court decisions.

3. The appellants state that all the following papers are found chronologically listed, indexed, and referred to in R. Vol. I.

A.

On December 28, 1939, the three-judge Federal court filed its opinion on the merits of the controversy, after the trial on the merits was concluded on September 21, 1939.

B.

By direction in that opinion, the plaintiffs (now appellees) were instructed to prepare findings of fact, conclusions of law, and decree *in accordance with* that opinion.

C.

On January 25, 1940, the final findings of fact, final conclusions of law, and final decree, so prepared, were signed by the three-judge Federal court and duly filed in the office of the Clerk of the U. S. D. C. at Lincoln, Nebraska, on that date.

> [A complete stenographic, typewritten transcript of all the evidence, statements, and exhibits introduced at the trial was prepared and filed with the Court, by agreement of both sides, upon submission of the cause.]

D.

On February 5, 1940 (February 4th fell on Sunday. Rule 6, Code of Civil Procedure), the appellants, in pursuance of Rules 52 and 59 of the Code of Civil Procedure, served the appellees and filed with the Clerk of the U. S. D. C. at Lincoln, Nebraska, a motion for new trial, rehearing, or to amend and correct the findings of fact, conclusions of law, and decree, supported by twenty-two (22) affidavits. All this showing appears in R. Vol. I, there duly indexed.

E.

On March 25, 1940, said last mentioned motions were duly entertained by oral argument presented by both sides and briefs submitted and filed by both sides at a hearing duly granted before the same three-judge Court. Thus, the motions attacking the objectionable decree of January 25, 1940, were entertained.

F.

On March 28, 1940, the three-judge court overruled said motions without further findings or opinion.

[This date, appellants contend, started the three calendar months' time for perfecting the appeal. (Title 28, U. S. C. A., Sec. 350).]

G.

On June 27, 1940, there was presented to one of the three United States judges who heard the case on the merits (Rule 36 of the U. S. Supreme Court, and Rule 72 of the Code of Civil Procedure) the following appeal papers (Rules 9, 10, and 12 of the U. S. Supreme Court): (a) Petition for Appeal; (b) Prayer for Relief; (c) Order Allowing Appeal; (d) Citation; (e) Cost Bond; (f) Assignment of Errors and Brief in Support; and (g) Jurisdictional Statement of Fact with Designation of Law Points and Brief in Support. The said Order Allowing Appeal and Citation, and the order fixing the amount of appeal bond and its approval, were duly signed by said United States Judge on said June 27, 1940. On the same day, all these papers were filed with the Clerk of the U. S. D. C. at Lincoln, Nebraska. There was no supersedeas bond requested or filed.

H.

On June 28, 1940, copies of all the foregoing papers, and a certified copy of the Citation, together with a statement

calling the appellees' attention to Rule 12 (3) of the U. S. Supreme Court Rules, were all duly served upon the appellees.

I.

On July 1, 1940, the proof of service upon the appellees of all the appeal papers mentioned in the above Paragraphs VII and VIII were duly filed with the Clerk of the U. S. D. C. at Lincoln, Nebraska.

J.

On July 3, 1940, appellees served upon appellants, and filed the same with the Clerk of the U. S. D. C. at Lincoln, their motion to dismiss the appeal or affirm the trial court's decree under Rule 12 (3).

K.

On July 16, 1940, the appellants filed in the office of the Clerk of the U. S. D. C., at Lincoln, this brief and answer to the appellees' motion to dismiss or affirm; and on the same day appellants served a copy hereof upon the appellees' attorney of record, as shown on the return filed herein.

II.

To prove to the U. S. Supreme Court that the appeal papers were properly and timely served and likewise filed in such manner as to perfect an appeal from the objectionable permanent injunction of January 25, 1940, appellants copy the pertinent wording from the following designated appeal papers filed and served as above set forth:

(1) The Citation, dated June 27, 1940, and served on appellees June 28, 1940, required the appellees to show cause:

> "* * * why the decree rendered against the said appellants on March 28, 1940, as in said appeal men-

tioned, should not be corrected and why speedy justice should not be rendered, and the cause reversed and dismissed * * *."

(2) The Petition for Appeal, served on appellees on June 28, 1940, and allowed by the Court and filed on June 27, 1940, stated, among other things:

"Theretofore, in the above cause, an opinion of Your Honors was filed and entered on December 28, 1939; and thereafter, findings of fact, conclusions of law, and decree were filed and entered on the 25th day of January, 1940. The said motion for new trial and rehearing and to correct the decree had twenty-two (22) affidavits attached, and was filed on February 5, 1940. The final decision overruling the motion to correct the decree, as above stated, was entered on March 28, 1940.

"Thus, this petition for appeal is presented for allowance within the three (3) calendar months provided by statute."

(3) The prayer in said Petition for Appeal, among other things, stated:

"That said cause upon appeal be reversed and the permanent injunction denied, vacated, and set aside, and the appellees' cause of action dismissed at the appellees' costs."

(4) The Order Allowing Appeal, signed and filed June 27, 1940, and served on the appellees June 28, 1940, stated:

"The appellants in the above entitled cause, who were the defendants, and each of them, having prayed for the allowance of an appeal in this cause to the Supreme Court of the United States from the opinion, findings of fact, conclusions of law and decree, and the order overruling the motion for new trial, rehearing and to correct said decree, made and entered on March 28, 1940, in the above entitled cause by the United States District Court, District of Nebraska, Lincoln Division, sitting as a three-judge federal court

under Section 266 of the Judicial Code; and having presented their petition for appeal, assignment of errors, prayer for reversal, and statement as to jurisdiction, pursuant to the statute and the rules of the Supreme Court of the United States in such cases made and provided:

"It is Now Here Ordered that an appeal be, and the same is, hereby allowed to the Supreme Court of the United States from the District Court of the United States, for the District of Nebraska, Lincoln Division."

(5) The fourteen Assignments of Error, with brief attached, dated and filed June 27, 1940, and served on the appellees June 28, 1940, specifically states:

"III.

The Court erred in granting the permanent injunction after it had found in its opinion of December 28, 1939, that the following facts [(a) to (n)] had been established by competent evidence at the trial."

"XIII.

The Court erred in granting the permanent injunction when it did not directly or indirectly in any part of its findings of fact, conclusions of law, or decree of January 25, 1940, state, find, conclude, or decree that the Nebraska act in question was violative of any provisions of the Federal or State Constitution or of the National Copyright Act."

"XIV.

The Court erred in failing to correct its decree of January 25, 1940, for the additional reasons set forth in appellants' motion for rehearing filed February 5, 1940, which reasons and grounds are made a part of this assignment of error as if copied verbatim herein."

[The last mentioned assignment of error (No. XIV; R. Vol. 1) advised the Court and appellees that just that one among the fourteen errors to be relied upon for reversal was the overruling of the motions to correct the findings, conclusions, and decree of January

25, 1940, because of the reasons in said motions and supporting affidavits set forth.]

(6) There will be no dispute about the fact that the papers above mentioned were signed, served, and filed on the dates above stated.

(7) Having fully set forth the facts and the references to the record above, the appellants now direct the Court's attention to the supporting brief to sustain appellants' contention that the appeal papers were timely filed and properly compiled, as well, to perfect an appeal from the objectionable permanent injunction of January 25, 1940, and are sufficient to present to the Supreme Court of the United States for review the question of whether or not the three-judge trial court erred in granting the permanent injunction on January 25, 1940; that such decree became final, for the purpose of this appeal on March 28, 1940, upon which date the motions for rehearing, new trial, or to correct the findings, conclusions, and decree were overruled.

WHEREFORE, the appellants pray for an order denying the appellees' motion to dismiss or affirm.

Dated at Omaha, Nebraska, this 16th day of July, 1940.

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Special Assistant to the Attorney General,
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Attorneys for Appellants.

WILLIAM J. HOTZ.

BRIEF IN SUPPORT.

PART I.

A motion for either a rehearing, or to correct the decree, or for new trial (Code of Civil Procedure, Rules No. 52 and 59), if timely filed and entertained by the court, extends the time for filing the appeal from the objectionable decree, attacked by such motion, to a period not to exceed three calendar months from the date of the overruling thereof. The appeal, if allowed within that time, and if the appeal includes an appeal from the previously entered objectionable final decree, brings before the appellate court for review the entire merits of the controversy, limited only by the assignment of errors and the designation of the law points relied upon for reversal.

(1) Section 266 of the Judicial Code (Title 28, U. S. C. A., Sec. 380), while providing for an appeal directly to the Supreme Court of the United States from a permanent injunction against a State law, granted by a three-judge Federal court, does not fix the time in which the appeal may be perfected. However, in the textbook entitled, "Jurisdiction of the Supreme Court of the United States" (Robertson and Kirkham), page 295, sec. 177, the authors state:

> "Unlike all of the other statutes which provide for direct appeal from the District Courts to the Supreme Court, section 266 of the Judicial Code contains no special time limit upon the taking of an appeal; and the provisions of section 8 (a) of the Act of February 13, 1925 (Title 28, U. S. C. A., Sec. 350), would appear to be controlling. That section provides generally that no appeal to the Supreme Court shall be allowed or entertained unless application therefor be duly made within three months after the entry of the judgment or decree sought to be reviewed."

(2) In the above mentioned sections and citations, reference is made to page 720, Sec. 354 of that text, commenting

upon extensions of time for making application for appeals. Therein, it is stated, with supporting authorities:

> "It is well settled that where the court below entertains a petition for rehearing, its judgment does not become final for purposes of Supreme Court review until that petition is overruled or otherwise disposed of and the three months' period for applying for Supreme Court review begins to run from the date of such denial or other disposition."

PART II.

By the decisions of the Supreme Court of the United States, all the points raised by appellees in their motion to dismiss or affirm have heretofore in similar cases been definitely decided against Appellees' contentions.

For example:

(1) In *U. S.* v. *Seminole Nation,* 299 U. S. 417, 57 S. Ct. 283, at page 286, it is held:

> "It is well settled that the time within which application may be made for review in this Court does not commence to run until after disposition of motion for a new trial seasonably filed and entertained." (Citing many cases.)

(2) In *Brockett* v. *Brockett,* 2 How. 238, 11 L. Ed. 251 (15 S. Ct. Curtis 107), the Court comments upon and decides the question of appealing from an order overruling a motion to correct a former previous objectionable decree and from the objectionable decree as well.

> "But an appeal has also been taken to the first decree (which was a final decree) rendered by the court. That decree was rendered on the 10th of May, 1843. During the same term, a petition was filed by the defendants on the 26th day of the same month, to have the final decree opened for certain purposes; and the court took

cognizance of the petition and referred it to a master commissioner. His report was made on the 9th of June following, the same term still continuing; and the court then refused to open the final decree; and from this refusal as well as from the final decree, the defendants took an appeal, and gave bond with sufficient sureties, on the 15th day of the same month, and the appeal was then allowed by the court."

On a motion to dismiss similar to the one at bar, the Court said:

"Upon the whole, we are of opinion that the motion to dismiss the appeal ought to be overruled, and it is accordingly overruled."

(3) In *Texas Pac. Ry. Co.* v. *Murphy,* 111 U. S. 488, 4 S. Ct. 497, at 498, 28 L. Ed. 492, the Court held that a motion for rehearing extended the time for review; also that a reference made in the appeal papers to the order refusing a rehearing of the previous decree was sufficient notice of an appeal from that objectionable previous decree. The Court held:

"The writ of error as issued is on its face for the review of the final judgment, not of the order refusing a rehearing. The judgment is sufficiently described for the purposes of identification. We are of the opinion, therefore, that the judgment as entered on the twenty-ninth of May is properly before us for consideration. The motion to dismiss is overruled."

(4) In *U. S.* v. *Elliott,* 223 U. S. 524, 32 S. Ct. 334, 56 L. Ed. 535, it is held:

"The grounds for the motion to dismiss are these: (a) that the appeal was not taken within ninety days after judgment * * *, and (b) that the appeal prayed for and allowed was not from the judgment of January 4, 1909, 'but was merely from the order overruling the motion for a new trial.' "

The Court held that the motion was without merit. In the opinion, the Court said:

> "It is, we think, also manifest that the appeal was taken upon the hypothesis just stated, that the judgment entered did not become a final judgment for the purposes of appeal until the motion for a new trial had been disposed of."

The Court then proceeded to decide the merits of the case on the appeal.

(5) *Citizens' Bank of Michigan City* v. *Opperman*, 249 U. S. 448, 39 S. Ct. 330, 63 L. Ed. 701, states:

> "Where a petition for rehearing is entertained, the judgment does not become final for purposes of our review until such petition has been denied or otherwise disposed of, and the three months' limitation begins to run from date of such denial or other disposition."

(6) In *Gypsy Oil Co.* v. *Escoe*, 275 U. S. 498, 48 S. Ct. 112, 72 L. Ed. 393, the Court held:

> "The running of the time within which proceedings may be initiated here to bring up judgment or decree for review is suspended by the seasonable filing of a petition for rehearing."

(7) *Voorhees* v. *John T. Noys Mfg. Co.*, 151 U. S. 135, 14 S. Ct. 295, 38 L. Ed. 101, states:

> "The appeal was allowed January 7, 1891, but the decree did not take final effect as of that date for the purposes of an appeal, nor until February 17, 1892, because the application for rehearing was entertained by the court, filed within the time granted for that purpose, and not disposed of until then."

(8) In *Aspen Mining & Smelting Co.* v. *Billings*, 150 U. S. 31, 14 S. Ct. 4, 37 L. Ed. 986, the Court said:

"The rule is that if a motion or a petition for rehearing is made or presented in season, and entertained by the court, the time limit for a writ of error or appeal does not begin to run until the motion or petition is disposed of. Until then the judgment or decree does not take final effect for the purposes of the writ of error or appeal."

(9) In *Zimmern* v. *U. S.*, 298 U. S. 167, 56 S. Ct. 706, the Court stated in passing upon the effect of advancing the time for appeal of an application or petition to amend and correct a decree:

"Until such action had been taken, it was no longer a decree at all. The judge had plenary power while the term was in existence to modify his judgment for error of fact or law or even revoke it altogether. (Citing cases.) Finality was lacking until his choice had been announced.

"The appeals being timely, the decree which dismissed them should be reversed, and the cause remanded to the Court of Appeals for the Fifth Circuit for further proceedings in harmony with this opinion."

PART III.

The application for new trial and for rehearing or to correct the decree and findings of January 25, 1940, filed by the appellants on February 5, 1940, was based upon the new Code of Civil Procedure, Rules 52, 59, and 6, which became effective September 1, 1938.

(1) Rules 52 and 59 provide for a new trial in suits in equity tried without a jury, as was the case at bar; and also provide that the court may open the judgment, if one has been entered, take additional testimony, amend findings of fact, conclusions of law, or make new findings of fact and conclusions and direct the entry of a new judgment. This is exactly what was requested by appellants in their timely

filed motions to that effect, and which were entertained and heard by the three-judge court though overruled on March 28, 1940. Therefore, the objectionable findings of fact, conclusions of law, and decree of January 25, 1940, became final on March 28, 1940, for the purposes of appeal for all previous errors committed, if shown in the record.

(2) Rules 9, 10, 12, and 36 of the Supreme Court of the United States have been followed by appellants in each particular in perfecting the appeal to this point, as the record clearly shows.

(3) The appeal papers, excerpts of which appear in Part I hereof (and all of which may be found copied verbatim in R. Vol. I), make it very certain that appellants are not appealing alone from an abuse of discretion of the trial court in overruling a motion for new trial in a federal case. On the contrary, the record is clear that the application for review is from the final decree and its supporting findings of fact and conclusions of law dated January 25, 1940; that the overruling of the motion to amend and correct these final papers of January 25, 1940, for the reasons given therein, is only one of the fourteen assignments of errors to be considered when reached by the appellate court. Perhaps the Supreme Court might decide to make the corrections as moved by appellants and denied by the trial court. In any event, the appeal is to reverse the cause and dismiss the permanent injunction granted and to vacate the decree holding as invalid the state law in question.

Conclusion.

The appellees' motion to dismiss or affirm should be denied with such costs and penalties awarded the appellants as the Court may deem just and proper in the premises.

Dated at Omaha, Nebraska, this 16th day of July, 1940.

Respectfully submitted,

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